No. 84-1513

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether police observation from aircraft of a fenced residential yard is a search under the Fourth Amendment of the United States Constitution.

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OPINION BELOW

The opinion of the Court of Appeal (Pet. App. A1-A21) is reported at 161 Cal.App.3d 1081, 208 Cal.Rptr. 93.

JURISDICTION

The judgment of the Court of Appeal was filed on November 20, 1984. (Pet. App. A1.) On December 20, 1984, a petition for rehearing was denied. (Pet. App. B.) The California Supreme Court denied a hearing on January 23, 1985. (Pet. App. C.)

A petition for a writ of certiorari was filed on March 22, 1985. On June 3, 1985, a writ of certiorari was granted limited to the first question in the petition. ___ U.S. ___ L.Ed.2d __, 105 S.Ct. 2672.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent

part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

STATEMENT OF THE CASE

A. Procedural History

Respondent, Dante Carlo Ciraolo, was charged in the Santa Clara County Superior Court, by an information of August 8, 1983, with cultivating and selling marijuana. (Cal. Health & Safety Code, §§ 11358, 11360(a) (J.A. 43-44; C.T. 50.)[1/]

Ciraolo moved in the trial court to suppress evidence of the cultivation, contending that it was obtained by an

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1. The designation "J.A." refers to the Joint Appendix. "C.T." refers to the Clerk's Transcript on appeal.

unreasonable search and seizure.[2] Specifically, he argued that police aerial observation of a marijuana garden within his home's fenced yard was an illegal search, and that evidence later seized from the property under a search warrant was suppressible fruit thereof. (C.T. 25-30.)

The motion was submitted on the search warrant, the search warrant affidavit, (J.A. 4-15, 48-49; C.T. 40, 72) and the transcript of the preliminary hearing. (J.A. 16-42, 49-50; C.T. 72.) The motion was denied on August 30, 1983. (J.A. 65.)

On October 4, 1983, Ciraolo withdrew his not guilty plea and entered a plea of guilty to cultivating marijuana conditional upon dismissal of the selling

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2. The motion did not involve the charge of selling marijuana which resulted from a separate investigation. (C.T. 42, 52-69.)

charge (C.T. 92; R.T. [Oct. 4, 1983]: 1-10.) On November 9, 1983, Ciraolo was granted probation for a period of three years. (C.T.; R.T. [Nov. 9, 1983]: 11-12.)

On January 6, 1984, Ciraolo appealed to the California Court of Appeal, pursuant to California Penal Code section 1538.5(m), from the order denying his motion to suppress evidence. (J.A. 66-67.) On November 20, 1984, Division Five of the California Court of Appeal, First Appellate District, reversed the judgment of conviction. Suppressing the evidence, the court held that the aerial observation was a warrantless search violating the Fourth Amendment. (Pet.App. A20.) The California Supreme Court denied a hearing over one justice's dissent. (Pet.App. C.)

B. Facts

On September 2, 1982, Detective John Schutz of the Santa Clara Police Department received an anonymous phone complaint. The message read: "Can see grass growing in yard, Stebbins by Clark, S/B on left." (J.A. 11, 30.)

Detective Schutz, a policeman for eight years, was assigned to the Narcotics Division. (J.A. 8-9.) Schutz was trained in marijuana identification and cultivation. (J.A. 9, 21.) He had assisted eradiction efforts by the Santa Clara County Narcotics Task Force and was familiar with identifying marijuana gardens in rural and urban areas. (J.A. 9.) Schutz had also reviewed numerous aerial photographs of marijuana gardens locally and on special assignment in Hawaii. (J.A. 9-10.)

Through his training and experience, Schutz was aware that marijuana growers

frequently conceal their gardens within greenhouses, among other plants and behind elevated fences. (J.A. 11-12.)

As a result of the phoned complaint, Schutz investigated the property at 2085 Clark Avenue; a house at Clark Avenue's northeast intersection with Stebbins Avenue in Santa Clara. (J.A. 7-8, 11.) That property had a six foot perimeter fence. From the street, Schutz could see a fifteen foot wide inner fence connecting the perimeter fence to the northwest corner of the house. That extension was elevated three to four feet by bamboo stakes precluding vision into the backyard from Schutz's position. (J.A. 11-12, 37-38; C.T. 40.)

Schutz had compiled ten to twelve other complaints of marijuana gardens at Santa Clara residential properties. (J.A. 30, 39.) Consequently, in the

afternoon of September 2, 1982, Schutz and Narcotics Agent Rodriguez chartered an aircraft and a qualified pilot to observe and photograph those properties from the air. (J.A. 12, 13, 30-31.)

The aerial observations were made under circumstances described by Schutz as follows:

> "We were extremely busy with plotting our direction. We had a number of different places to go. We had to watch for other aircraft. We were in a flight line with the San Jose airport. And all I recall is plotting these various locations on my map; attempting to get the [sic] one point after another, without tying up air traffic too long." (J.A. 38.)

The aircraft maintained an altitude in excess of 1000 feet above ground level. (J.A. 12, 31-33.) Without visual aids, Detective Schutz and Agent Rodriguez identified, by its highlighted green color, a 15 by 25 foot marijuana garden of 8 to 10 foot tall plants in

the backyard of 2085 Clark Avenue. (J.A. 12-14, 32-33, 36.) The officers photographed the garden using a thirty-five millimeter camera (J.A. 13, 33-38; C.T. 40).[3/] Five other marijuana gardens were identified elsewhere in Santa Clara. (J.A. 39.)

Schutz obtained a search warrant for 2085 Clark Avenue on September 8, 1982. (J.A. 4-6, 20-21.) Respondent Ciraolo was in the house when the warrant was served the following day. (J.A. 20-21, 23-25.) Evidence of Ciraolo's occupancy

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3. The oblique-angle photograph, attached to the search warrant affidavit in this case, pictures 2085 Clark Avenue at the approximate center. In the backyard, a large, circular, doughboy pool separates the marijuana garden (situated beneath a telephone pole) from a patio area partially shaded by an outdoor umbrella. The fifteen foot wide extension to the perimeter fence at the home's rear corner, seen by Schutz from the street, separates the larger side yard containing an unidentified structure from the marijuana garden. (C.T. 40; J.A. 48-49.)

was found there. (J.A. 21-23.) Seventy three cultivated marijuana plants, averaging eight feet tall, were seized from the back yard. (J.A. 21, 40.)

C. Judgment of the California Court of Appeal

In its opinion, the California Court of Appeal quoted from Katz v. United States, 389 U.S. 347, 351-352 (1967): "[W]hat a [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 161 Cal.App.3d at 1088, 208 Cal.Rptr. at 96-97; Pet.App. A14. The court also quoted from Oliver v. United States, 466 U.S. ____, 80 L.Ed.2d 214, 225, 104 S.Ct. 1735, 1742 (1984): "The distinction [between open fields and curtilage] implies that . . . the curtilage . . . warrants the Fourth Amendment protections that attach to the home." People v. Ciraolo, 161 Cal.App.3d

at 1089; 208 Cal.Rptr. at 97; Pet.App. A17.

The lower court reasoned: "Defendant's backyard is within the curtilage; the height and existence of the two fences constitute objective criteria from which we may conclude he manifested a reasonable expectation of privacy by any standard." 161 Cal.App.3d at 1089; 208 Cal.Rptr. at 97; Pet.App. A17.4/

The court, however, qualified this conclusion: "From the perspective of defendant's reasonable expectation of privacy we deem it significant that the

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4. The court's reference to "two fences" appears to have followed from a conception of defendant's property as containing separate inner and outer fences each enclosing the backyard. (see, 161 Cal.App.3d at 1085; 208 Cal.Rptr. at 94; Pet. App. A2.) If the court made such an error it is unimportant. The fence bordering the marijuana garden rose to a height of about ten feet. (J.A. 37.)

aerial surveillance . . . was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within defendant's curtilage." 161 Cal.App.3d at 1089; 208 Cal.Rptr. at 97; Pet.App. A18-19.

Distinguishing this case from "observation of an open corn field which also contains a cannabis crop", the court perceived itself as "confronted instead with a direct and unauthorized intrusion into the sanctity of the home." 161 Cal.App.3d at 1089-1090, 208 Cal.Rptr. at 97-98; Pet. App. A19 [fn. omitted].

SUMMARY OF ARGUMENT

The curtilage doctrine protects against warrantless physical intrusions into the home. A fence does not preclude all government views of

curtilage from outside. A person may reasonably expect that an officer will not jump a fence or place a ladder against it. However, it does not follow that police in aircraft can never look into the yard. Thus, the fact that something would be unseen by police but for their use of an airplane does not constitutionally fulfill the mere hope that it will not be seen. Although this was Ciraolo's actual expectation, it is not one which society accepts as reasonable, especially when, as here, there exists specific justification for focusing upon his particular yard.

There is no reason why police should be precluded from observing what would be entirely visible to them as private citizens from the same vantage point. Texas v. Brown, 460 U.S. 730, 740 (1983). Such an observation notes something outside the home that was

voluntarily exposed to anyone who looked. United States v. Knotts, 460 U.S. 276, 281 (1983); Katz v. United States, 389 U.S. at 351.

The Court of Appeal's constitutionally protected area analysis erroneously hinges upon one's ability to close a yard to ground view and upon the characterization of an aerial observation as either directed or routine. Both criteria, uniformly rejected by other courts, would protect a few from being viewed by police performing what society considers to be activity open to view. Yet, these criteria fail to protect the many from aerial observations which are truly invasive of legitimate privacy expectations in the home.

Aerial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses

those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.

That is not this case. Nothing was discovered in Ciraolo's yard that was concealed from aircraft. The police did not forfeit their right to observe, as they can on any routine aerial patrol, merely because they suspected Ciraolo in advance. Ciraolo's hope that police would not see is not protected by the Fourth Amendment.

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ARGUMENT

THE AERIAL OBSERVATION DID NOT INTRUDE INTO LEGITIMATE PRIVACY EXPECTATIONS AND, THEREFORE, DISCOVERY OF CIRAOLO'S MARIJUANA GARDEN DID NOT VIOLATE THE FOURTH AMENDMENT

A. Ciraolo's Expectation That Police Would Not See His Marijuana Garden Is Unreasonable

The term curtilage defines that area to which extends the "intimate activity" of the home. Oliver v. United States, 466 U.S. at___, 80 L.Ed.2d at 225; 104 S.Ct. at 1742. The Fourth Amendment precludes warrantless physical entries by police into curtilage made with a purpose to indiscriminately seize items or rummage through goods and articles that were expectedly private. See, Coolidge v. New Hampshire, 403 U.S. 443, 474-475 (1971) (car in driveway seized and contents searched); Taylor v. United States, 265 U.S. 57, 59 (1924) (entry into detached garage); Cf., Hester v.

United States, 265 U.S. 57, 59 (1924) (abandoned containers). The Fourth Amendment's primary concern is with physical entry into the home which, by its nature, lays bare the "privacies of life". Payton v. New York, 445 U.S. 573, 583 (1980), quoting Boyd v. United States, 116 U.S. 616, 630 (1886).

This Court has never held those privacies violated merely because police intentionally view curtilage. E.g., United States v. Santana, 427 U.S. 38, 42 (1976); Hester v. United States, 265 U.S. at 59. Nor does the Fourth Amendment prohibit police from entering navigable airspace to survey curtilage.

The California court seemingly conceded that in contrasting this case with routine aerial patrol. Saying something is "in the curtilage" means only that protection may be demanded

from warrantless physical intrusions which is not afforded in "open fields". Oliver v. United States, 466 U.S. at __, 80 L.Ed.2d at 224, 104 S.Ct. at 1741. Thus, physically nonintrusive aerial observation of curtilage does not, standing alone, violate the Constitution.

The California Court of Appeal, while not disputing this, believed that Ciraolo's fence precluded aerial observation directed at his curtilage. Because Ciraolo concealed his marijuana from ground observation he exhibited a legitimate expectation of privacy from such directed observations, according to the lower court. This theory will not fly.

"[A]n expectation of privacy, strictly speaking, consists of a belief that uninvited people will not intrude in a particular way." United States v.

Lyons, 706 F.2d 321, 326 (D.C. Cir. 1983) (emphasis orig.); accord, Dow Chemical Co. v. United States, 749 F.2d 307, 312-313 (6th Cir. 1984), cert. granted, __ U.S. ___, __ L.Ed.2d __, 105 S.Ct. 2700. Thus, a fence protects against a roving peeping tom, but not against a citizen on a nearby hillside, or police in the air, following a report of suspicious activity within.

That an individual "chooses to conceal assertedly 'private' activity", Oliver v. United States, 466 U.S. at ____, 80 L.Ed.2d at 227, 104 S.Ct. at 1743, does not establish that an observation by police works an infringement "upon the personal and societal values protected by the Fourth Amendment." Id. This is as true of

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curtilage as it is open fields.5/

A residential fence is a reference useful to assess initially whether privacy was expected at all, and, if so, from what. It is one thing to say that police cannot climb a residential fence, State v. Boynton, 574 P.2d 1330, 1333-1334 (Haw. 1978), or peer through a narrow aperture in it. People v. Lovelace, 116 Cal.App.3d 541, 548-555,

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5. Even in the context of physical intrusions into curtilage, the fact that one's surroundings afford some measure of privacy does not mean that, absent exigent circumstances, police can never enter nor that they must blind themselves when they do. See, United States v. Roberts, 747 F.2d 537, 542-543 (9th Cir. 1984); United States v. Magana, 512 F.2d 1169, 1170-1171 (9th Cir. 1975), cert. denied, 423 U.S. 826; United States v. Ventling, 678 F.2d 63, 65-66 (8th Cir. 1982); Ellison v. United States, 206 F.2d 476, 478 (D.C. Cir. 1953); People v. Bradley, 1 Cal.3d 80, 85, 81 Cal.Rptr. 457, 459, 460 P.2d 129, 131 (1969); State v. Lyons, 307 S.E.2d 285, 286 (Ga.App. 1983); State v. Nine, 315 So.2d 667, 670-672 (La. 1975); State v. Crea, 233 N.W.2d 736, 739 (Minn. 1975); People v. Smith, 487 N.Y.S.2d 210, 213 (A.D. 4 Dept. 1985).

172 Cal.Rptr. 65, 68-73 (1981). It is quite another thing to say that police cannot fly and look down. The difference is that the former activities invades expectations that are recognized, endorsed and permitted by society. The latter activity ordinarily does not.

This Court stated in Oliver:

> "Since Katz v. United States, 389 U.S. 347 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectations of privacy'. 389 U.S. at 360 (Harlan, J., concurring.) The Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as "reasonable"' Id. at 361. See also, Smith v. Maryland, 442 U.S. 735, 740-741 (1979)." 466 U.S. at ___, 80 L.Ed.2d at 223; 104 S.Ct. at 1740.

Tested by this measure, Ciraolo did not have a legitimate expectation of privacy from the aerial observation of

his garden. First, Ciraolo could not have rationally believed the existence of an item the size of his garden was private from air observation. Rather, he subjectively assumed that its exposure to aircraft risked casual observation but not its identification as marijuana. Katz, however, expected his phone conversation would be undisclosed to all outsiders just as Coolidge did not expect that his automobile would be inventoried by police or anyone else trespassing his driveway.

"The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." United States v. Jacobsen, 466 U.S. ___, ___, 80 L.Ed.2d 85, 100, 104 S.Ct. 1652, 1661

(1984) [fn. omitted.] Ciraolo's personal expectation lacks any basis in "concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. 128, 144, fn. 12 (1978). His hope that a garden "clearly and contemporaneously visible from the same aerial vantage point", United States v. Bassford, 601 F.Supp. 1324, 1332 (D. Maine 1985), as occupied by police would not attract attention, is no different than any other expectation of nondiscovery. What "a person knowingly exposes, even in his home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. at 351.

When police flying in navigable airspace in a physically nonintrusive manner see readily discernable objects in the curtilage, the observation

involves no deprivation of the home's security. Exposure of such things as 8-10 foot plants in an open air garden by their very nature, renders them visible to police like anyone else.

Such an observation is no different than cases where police position themselves on a raised embankment, United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), cert. denied, 416 U.S. 936; a neighbor's porch, United States v. McMillon, 350 F.Supp. 593, 596-597 (D.C. 1972); a neighboring upper story window, Dillon v. Superior Court, 7 Cal.3d 305, 309-312, 102 Cal.Rptr. 161, 164-165, 497 P.2d 505, 508-509 (1972); Commonwealth v. Williams, 396 A.2d 1286, 1290-1291 (Pa.Super. 1978), rev'd on related ground, 431 A.2d 964, 966 (Pa.1981) (use of "startron"); an adjacent public tennis court and hill, State v. Holbron, 648 P.2d 194, 196 (Haw.

1982); or just off a front sidewalk. United States v. Johnson, 561 F.2d 832, 840-842 (D.C. Cir. 1977) (en banc), cert. denied, 432 U.S. 907. The view from police aircraft is generally no more invasive than one from any other position outside curtilage. There is nothing outrageous or unacceptable in the fact that police see what is obvious and patent.

B. Police Were In A Public Place Open To Their Use

The Court of Appeal did not challenge the right of police to use navigable airspace. Congress has provided that every citizen has a public right of transit through that space. 49 U.S.C., § 1304.6/

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6. Where the federal government has not been granted or assumed sovereignty in the airspace, California exercises sovereignty. (Cal.Pub.Util. Code,

(Footnote 6 continued on next page)

Ciraolo's fence does not make the airways any less open to police. The fact that police found it necessary to

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Footnote 6 continued:

§ 21401.) State law provides for a public right to use airspace for flight. (Cal.Pub.Util Code, § 21401-21403.) The Federal Aviation Administration provides for altitude regulation of aircraft in airspace. As pertinent to this case, the regulations require a minimum altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. (14 C.F.R., § 91.79(b).) The fact that the officer is in a public place is not the whole answer. It is, however, relevant to the initial determination of whether that seen was expectedly private.

"[W]hen police surveillance takes place at a position which cannot be called a 'public vantage point', i.e., when the police--though not trespassing upon the defendant's curtilage--resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would ordinarily be expected to be, the observation or overhearing of what is occuring within a dwelling constitutes a Fourth Amendment search. This is really what Katz is all about." 1 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.3, 304-305 (1978) (fn. omitted) (emphasis added). Certainly no greater rights attach to the curtilage than to the interior of the home.

reposition themselves in order to obtain a view is immaterial.

In Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974), a health inspector without warrant entered the outdoor premises of a plant to observe smoke emanating from the chimneys. This Court found no search. It distinguished entries into private spaces to inspect equipment or papers. Id., at 864-865. The inspector was not in an area "from which the public was excluded" and observed what "anyone in the city . . . near the plant could see." Id., at 865. The Court did not rest its conclusion on whether the observations would have been possible "but for" the inspector's position on plant property: "Depending upon the layout of the plant, the inspector may operate within or without the premises

but in either case he is well within the 'open fields' exception . . ." Id.

The same result follows where officers look into enclosures. In Texas v. Brown, 460 U.S. 730 (1983) (plurality opinion), a policeman "shifted his position in order to obtain a better view" and "bent down at an angle so [he] could see what was inside" the glove compartment of an automobile. Id., at 734, 740. This activity was held to be "irrelevant to Fourth Amendment analysis". Id., at 740. The officer was properly in a position from which he could view the compartment:

> "The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring);

> Smith v. Maryland, 442 U.S. 735, 739-745 (1979); shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search . . ." Id., at 740.

Here, as in Western Alfalfa and Brown, investigators went to an open place from which they and the public alike could see Ciraolo's garden. The fact that police used an airplane, without which Ciraolo's garden might have remained unseen, makes no difference.

In United States v. Knotts, 460 U.S. 276 (1983), police located a container of chloroform outside the defendant's cabin by monitoring a beeper in the container from a helicopter after losing sight of a vehicle transporting the

chemical.[7] While recognizing that Knotts had the "traditional expectation of privacy within a dwelling place", Id., at 282, the dispositive fact was that "no indication [existed] that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." Id., at 285. Since visual surveillance "from public places . . . adjoining Knott's premises" could have revealed the presence of the chemicals on the property, the use of the beeper to determine the location of the chloroform was not a search. Id., at 282, 284.

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7. The Court of Appeal's decision reflects that the chloroform drum was beneath a wooden barrel in the cabin's yard. United States v. Knotts, 662 F.2d 515, 518 (8th Cir. 1981), rev'd, 460 U.S. 276, 285.

This Court soon after Knotts ruled beeper-monitoring of a container inside the home unlawful. United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984). In Karo, the Court explained that officers could not make a warrantless entry to verify the container's presence there. "For purposes of the [Fourth] Amendment, the result is the same where, without a warrant, the Government employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at ____, 82 L.Ed.2d at 541, 104 S.Ct. at 3303. "The case is thus not like Knotts, for there the beeper told the authorities nothing about the interior of Knotts' cabin." 468 U.S. at ___, 82 L.Ed.2d at 542, 104 S.Ct. at 3304.

The airplane here, like the beeper monitoring in Knotts, revealed something outside defendant's residence that was "'voluntarily conveyed to anyone who wanted to look'". Id., quoting, United States v. Knotts, 460 U.S. at 281.[8] Conversely, it revealed nothing inside Ciraolo's house. Ciraolo's fence, necessitating aerial survey, is no more relevant than the failure of the visual surveillance in Knotts, where police found an object on the defendant's premises "when they would not have been able to do so had they relied solely on

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8. See also, Smith v. Maryland, 442 U.S. 735, 743-744 (1979) (telephone numbers); United States v. Miller, 425 U.S. 435, 442-444 (1976) (bank records); United States v. Choate, 576 F.2d 165, 175-180 (9th Cir. 1978), cert. denied, 439 U.S. 953; reiterated, 619 F.2d 21, 22 (9th Cir. 1980), cert. denied, 449 U.S. 951 (mail cover); United States v. Hoffa, 436 F.2d 1243, 1247 (7th Cir. 1970); cert. denied, 400 U.S. 1000 (mobile telephone unit call over public frequency).

their naked eyes." United States v. Knotts, 460 U.S. at 285.

Knotts is clear: nothing in the Fourth Amendment requires police to forego aids which render perceptible to them what was exposed to everyone. To the extent an airplane is simply another aid, like binoculars or telescopes, its use was unobjectionable.

In United States v. Lee, 274 U.S. 559, 563 (1927), this Court indicated that magnification tools generally involve no Fourth Amendment violation. Lee was cited in Katz, 389 U.S. at 351, and has since been quoted in Texas v. Brown, 460 U.S. at 740 and United States v. Knotts, 460 U.S. at 283. Accordingly, using binoculars or telescopes to view grounds, including fenced residential yards, from outside

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curtilage is not ordinarily a search.[9] In the absence of a legitimate expectation of privacy, police may use binoculars to view objects inside homes or other structures.[10] Where, however, it is legitimately expected that nobody

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9. United States v. Lace, 669 F.2d 46, 50-51 (2d Cir. 1982); cert. denied, 455 U.S. 854; United States v. Minton, 488 F.2d at 38 (barn); People v. Vermouth, 42 Cal.App.3d 353, 361-362, 116 Cal.Rptr. 675, 680 (1974) (sun deck); Sims v. State, 425 So.2d 563, 567 (Fla.App. 1982) (yard), pet. for reversal denied, 436 So.2d 100 (Fla. 1983); State v. Holbron, 648 P.2d at 196-197 (fenced backyard), see also, United States v. Hensel, 699 F.2d 18, 41 (1st Cir. 1983); cert. denied, 461 U.S. 958 (cases cited but point waived.)

10. Fullbright v. United States, 392 F.2d 432, 433-436 (10 Cir. 1968), cert. denied, 393 U.S. 830 (shed); United States v. Christensen, 524 F.Supp. 344, 346-348 (N.D. Ill. 1981) (business); United States v. Bifield, 498 F.Supp. 497, 506-508 (D. Conn. 1980), aff'd, 659 F.2d 1063 (2d Cir. 1981) (unpublished) (gas station); Cooper v. Superior Court, 118 Cal.App.3d 499, 509-510, 173 Cal.Rptr. 520, 525-526 (1981) (home); People v. Hicks, 364 N.E.2d 440, 444

(Footnote 10 continued on next page)

could otherwise see the minute items and activities within a home that were revealed by binoculars and telescopes, courts have found a search.[11] The latter cases, whatever their merit may be, are concerned with visual aids revealing things inside the home that were demonstrably private to all outsiders. Ciraolo's garden, outside

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Footnote 10 continued:

(Ill.App. 1977) (hotel room); State v. Thompson 241 N.W.2d 511, 513 (Neb. 1976) (house); Commonwealth v. Hernley, 263 A.2d 904, 906-907 (Pa.Super. 1970), cert. denied, 401 U.S. 914 (printshop); Commonwealth v. Williams, 396 A.2d at 1290-1291 (apartment); State v. Manly, 530 P.2d 306, 309 (Wash., 1975) (apartment).

11. United States v. Taborda, 635 F.2d 131, 139 (2d Cir. 1980); United States v. Kim, 415 F.Supp. 1252, 1256 (D. Haw. 1976); People v. Arno, 90 Cal.App.3d 505, 509-512, 153 Cal.Rptr. 624, 626-628 (1979); State v. Ward, 617 P.2d 568, 570-573 (Haw. 1980); State v. Blacker, 630 P.2d 413, 414-415 (Or.App. 1981); see also, People v. Ciochon, 319 N.E.2d 332, 334-336 (Ill.App. 1974) (remanded for evidentiary hearing).

the home, was just the opposite.

C. Both The Protected Area And Directed Search Rationales Of The Court Of Appeal Should Be Rejected

The California court found that Ciraolo's fence established a legitimate expectation of privacy "by any standard". (Pet.App. A17.) It was a protected area. The court then qualified the legitimacy it had just conferred by emphasizing that the observation was directed at Ciraolo's yard and not the result of "routine patrol". (Pet.App. A18-19.) Neither of these "tests" should be adopted.

Protected Area

This Court recognized in Oliver v. United States, 466 U.S. at ___, 80 L.Ed. at 224, 104 S.Ct. at 1741 that both the "public and police lawfully may survey lands from the air [citations]". As to aerial observation, Oliver drew no distinction between open fields and

curtilage. Land of each type is frequently fenced.[12] Whether marijuana crops are fenced in open fields or curtilage, they are equally visible to police from aircraft.

Moreover, "[i]n most cases it would be impracticable to view one without contemporaneously viewing the other." United States v. Bassford, 601 F.Supp. at 1332. Likewise, in many cases, police will "have to guess . . . whether landowners had erected fences sufficiently high . . . to establish a right of privacy." Oliver v. United States, 466 U.S. at ___, 80 L.Ed.2d at 226, 104 S.Ct. at 1742-1743.

The lower courts have consistently upheld unobtrusive aerial observation of

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12. "An open field need be neither 'open' nor a 'field' as those terms are used in common speech." Oliver v. United States, 466 U.S. at ___, n. 11, 80 L.Ed.2d at 225, n. 11, 104 S.Ct. at 1742, n. 11.

curtilage closed to ground view.[13] These decisions repeatedly emphasize that it is, ultimately, the nature of the government's activity, not the measures taken to conceal objects from ground

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13. United States v. Bassford, 601 F.Supp. at 1328-1332, 1334-1335 (D. Maine 1985) (marijuana gardens 10 and 5 feet from two homes in a heavily wooded, posted, 30-acre property); Randall v. State, 458 So.2d 822, 824-826 (Fla.App. 2 Dist. 1984) (marijuana in backyard of duplex apartment behind reed fence); State v. Stachler, 570 P.2d 1321, 1326-1329 (Haw. 1977) (8 to 10 foot tall marijuana patch 15 feet from secluded home in remote area); State v. Rogers, 673 P.2d 142, 143-144 (N.M.App. 1983) (plants protruding from greenhouse near house within fence); Cf. People v. Sneed, 32 Cal.App.3d 535, 540-543, 108 Cal.Rptr. 146, 149-151 (1973) (helicopter hovered 20 to 25 feet over corral 125 feet behind house; rev'd.)

Other cases have affirmed without stopping to examine whether the area was curtilage although the facts did not preclude that possibility. E.g., United States v. Allen, 675 F.2d 1373, 1380-1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (aerial photography of modifications to a barn not observable outside 200 acre ranch on sea coast); United States v.

(Footnote 13 continued on next page)

view, which controls.[14] Police should be permitted to observe "conspicuous and readily identifiable" evidence of crime in a residential yard. People v. Superior Court (Stroud), 37 Cal.App.3d 836, 839, 112 Cal.Rptr. 764, 765 (1974).

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Footnote 13 continued:

Hensel, 699 F.2d 18, 41 (1st Cir. 1983), cert. denied 461 U.S. 958 (air observation of property containing several buildings, garage and deep water dock), State v Davis, 627 P.2d 492, 493-494 (Or.App. 1981), pet. denied, 634 P.2d 1346 (Or. 1981) (marijuana 150 to 300 feet from secluded residences with signs and locked gate); see also, State v. Cockrell, 689 P.2d 32, 33-34 (Wash. 1984) (state constitution).

14. "There is almost uniform agreement, among those who have considered the question, that an attempt to exclude ground-based observation fails to demonstrate an expectation of privacy from the air." Comment, Aerial Surveillance: A Plane View of the Fourth Amendment, 18 Gonz.L.Rev. 307, 324, n. 100 (1982-83) (cases cited.)

Directed Search

The analytic basis for the directed search rationale is unclear. Neither Ciraolo nor the California court have offered authority for it.15/

Its source may be the plurality portion of the opinion in Coolidge v. New Hampshire, 403 U.S. 443 which states

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15. It is unclear whether Ciraolo is disengaging himself on this point, however slightly, from the California court's holding. In his most recent briefs, Ciraolo emphasizes that the tip was "nonspecific", "unvalidated" and "anonymous". (Ans. to Pet. for Hg. [filed Jan. 8, 1985] 3; Cert. Opp. 5). This may only be rhetoric to obscure the fact that police acted on particularized suspicion that a specific crime was taking place rather than on random curiousity to see inside this yard. On the other hand, it may signal Ciraolo's discomfort with the logical endpoint of the Court of Appeal's analysis: acting on suspicion to observe one yard from the air is bad while acting on none to observe all is good. Whatever Ciraolo means, we take the lower court's opinion holding "the warrantless overflight . . . an unreasonable search" (Pet.App. A20) at face value. If looking at a particular yard is the real evil, then a specific, validated and known tip, i.e., probable cause, will not excuse a warrant.

that "the discovery of evidence in plain view must be inadvertent." Id., at 470. However, that language distinguished two sorts of seizures and has no application here:

> "It is important to distinguish 'plain view', as used in Coolidge to justify seizure of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search [citations], the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, [citations], justify police conduct affording them access to a particular item." Texas v. Brown, 460 U.S. at 738, n. 4 (emphasis orig.); see also, Id., at 751, n. 4 (Stevens, J., concurring in judgment); 1 LaFave, Search and Seizure, § 2.2(a) 241-243.

"[T]he purpose of the Fourth Amendment is to guard against arbitrary

governmental invasions of the home . . . regardless of the purpose for which that entry is sought." Payton v. New York, 455 U.S. at 582, n. 17 (1980). It is a strange rule which recognizes legitimate privacy expectations "by any standard" (Pet.App. A17), but excuses their violation if police intrude on a "routine", i.e., arbitrary, basis.16/

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16. If preservation from disclosure to government of objects enclosed in fenced yards is the key value, the intention of police to see those objects on routine air patrol surely precludes achieving that goal. Thus, contrary to the California court, the intention of government to see into a specific enclosure is irrelevant, unless we indulge the peculiar notion that residents will be idiosyncratically comforted knowing that police are not looking because of a tip. It is due to this logically irreconcilable aspect of the California court's decision, plus the fact that it ambiguously characterized the directed nature of the flyover to be "significant" (Pet. App. A18), not necessarily dispositive, that we suspect exclusionary rule concerns lurk beneath a mask of privacy expectation analysis. The California court might just as well

(Footnote 16 continued on next page)

Inadvertence is routinely rejected as a requirement for a lawful aerial

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Footnote 16 continued:

have said that all aerial observations of fenced residential yards are searches but only directed flyovers can be deterred by a warrant requirement.

That the court did not render its holding in such form is probably more meaningful than what it did say. First, it would imply that Ciraolo's expectation of privacy is, at best, so abstract and theoretical that, in general, the cost to society of its enforcement through exclusion of evidence is prohibitive. Second, it would leave open the possibility of civil remedies against routine air patrol that are unacceptable to anyone except criminals. Third, it would make crystal clear that police could avoid exclusion if they dissemble about the degree to which they focused on a specific fenced yard; a puzzle this Court avoided solving by keeping a gnomic silence on just how significant directed flyovers are. Fourth, it would render the uncomfortable implications of its decision too plain to require closer scrutiny: something has gone very wrong with the Fourth Amendment when the eminently reasonable police activity in this case is outlawed but, by only modest logical extension, legitimacy is conferred on "random" enhanced viewing of a whole neighborhood of unfenced yards from a government satellite in geosynchronous orbit.

observation. Randall v. State, 458 So.2d at 825; State v. Stachler, 570 P.2d at 1327; State v. Layne, 623 S.W.2d 629, 635 (Tenn.Cr.App. 1981). Indeed, receipt of information causing police to focus on specific property adds to the flight's justification. United States v. Marbury, 732 F.2d 390, 399 (5th Cir., 1984); United States v. Allen, 675 F.2d at 1381; United States v. DeBacker, 493 F.Supp. 1078, 1081 (W.D. Mich. 1980); State v. Rogers, 673 P.2d at 144.

D. Police Did Not Violate A Legitimate Privacy Expectation

Our society expects police to survey residential areas from aircraft to enforce criminal laws. In no sense, does society acknowledge that crime flourishing in view of everyone leaves police helpless to act whenever a fence is built.

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Absent invasive procedures, no privacy interest is advanced by fictionally protecting what can readily be seen by anyone in an aircraft in navigable space, including police on patrol. Once it is seen, every reason permits the officer to scrutinize it with every means at hand.[17/] "[W]hat is

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17. In the proper discharge of his duty, such activity serves to avoid the risk of misdescription of what has been already seen, a risk in which there is no cognizable interest. United States v. Jacobsen, 466 U.S. at _____, 80 L.Ed.2d at 98, 104 S.Ct. at 1659. In this case, for example, the photograph of Ciraolo's neighborhood served to preserve what police had already lawfully seen. Such action violates no legitimate expectation of privacy. State v. Dickerson, 313 N.W.2d 526, 532 (Iowa 1981); Annot., Employment of Photographic Equipment to Record Presence and Nature of Items as Constituting Unreasonable Search, 27 A.L.R. 4th 532 (1984); see, United States v. Allen, 675 F.2d at 1380; Cf. United States v. White, 401 U.S. 745, 748-753 (1971) (plurality opinion) (recording in home by informant); United States v. Miller, 753 F.2d 1475, 1480 (9th Cir. 1985) (informant corroborated by aerial photo.)

observable by the public is observable without a warrant, by the Government . . . as well." Marshall v. Barlow's Inc., 436 U.S. 307, 315 (1978).

The potential abuses that Ciraolo says cry out for a magistrate's Fourth Amendment flight plan resonate soundlessly in their absence here. This Court has "never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." United States v. Karo, 468 U.S. at ___, 82 L.Ed. 2d at 539, 104 S.Ct. at 3302.

No sophisticated technology exposed intimate secrets of Ciraolo's life, much less imperceptible features of his yard. No physically intrusive activity threatened his private affairs. Police flew in a flight path (J.A. 38), did not swoop low (J.A. 31) nor even use binoculars (J.A. 32). The observation

was nothing more than the view to be had by any other aircraft.

The view of Ciraolo's yard could not have been plainer, the position of police more ope nor their actions more reasonable. There was no search. The Court of Appeal erred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

DATED: August 8, 1985

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CERTIFICATE OF SERVICE BY MAIL

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,	)	No. 84-1513
v.	)	
DANTE CARLO CIRAOLO, Respondent.	)	

State of California)
) ss.
City and County of San Francisco)

LAURENCE K. SULLIVAN, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on August 8, 1985 true copies of the attached Brief For Petitioner in the above-entitled matter were served on counsel of record by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California with first class postage thereon fully prepaid.

Laurence K. Sullivan
LAURENCE K. SULLIVAN
Deputy Attorney General

Subscribed and sworn to before me this 8th day of August, 1985

Marilyn J. Chedister
NOTARY PUBLIC IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA

MARILYN J. CHEDISTER
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN FRANCISCO
My commission expires March 17 1989